witness, but that the defendant could, and his failure to do so could be accounted for only on the ground that her evidence would show him guilty of murder, was improper.

At common law, it was the rule that neither husband nor wife was competent to bear testimony at the trial of the other. *Fink v. Denny,* 75 Va., 663; *Moffatt v. Moffatt,* 10 Bosw. (N. Y.), 468; *Snyder v. Snyder,* 6 Bing. (Pa.), 483. In most cases when one spouse is offered as a witness against the other, the incompetency is more a matter of disability than of privilege. *Brock v. State,* 44 Tex. Crim., 335. But at common law no apparent distinction is made between the two. *People v. Mercein,* 8 Paige (N. Y.), 47; *Tucker v. State,* 71 Ala., 342. Under the early statutory change of the common law rule, the courts interpreted the failure of the spouse accused to call the other to the stand as a ground for an inference of guilt. The leading case upon this is *State v. Bartlett,* 65 Me., 200. See also *Wigmore on Evidence,* vol. iv, p. 3144. But it was subsequently generally enacted by statute that no such inference should be drawn, the same rule applying to the failure of the accused to take the stand in his own behalf, and to his failure to call his spouse to the stand. For a digest of such statutes, see *Wigmore,* vol. i, p. 488. Under such statutes it has been held that a failure of accused to testify or to call spouse to stand as witness must not be commented upon by counsel. *Cooper v. State,* 86 Ala., 610; *People v. Tyler,* 36 Cal., 522. But in Texas, where the wife was the sole witness of a homicide, it was held that her failure to testify could be commented on. *McMitchell v. State,* 49 Tex. Crim., 422. The holding of the principal case seems to carry out the true spirit of the statute. If the failure of the husband to call his wife as a witness in his behalf were to be construed as a circumstance against him, his privilege in the matter would be annulled, and he would be compelled, in all cases, to introduce her or run the risk of being convicted on an implied admission.

DAMAGES—BREACH OF CONTRACT—MENTAL ANGUISH.—BROWNING V. FIES, 58 SOU. (ALA.), 931.—*Held,* that where a liveryman failed to supply the plaintiff with a carriage as contracted, knowing that the plaintiff wished it to carry him to his wedding, damages for "mental anguish" are recoverable in an action for breach of contract.

It is a well established rule that mental distress, disconnected with physical suffering, has no place as an element of the damages recoverable upon a breach of contract. *Wilcox v. Richmond & D. R. Co.,* 52 Fed., 264; *Connell v. Western U. T. Co.,* 3 Dak., 315. Yet many jurisdictions allow recovery for the mental distress and humiliation attendant upon the breach of the contract of carriage by the wrongful expulsion of a passenger from the vehicle of a carrier. *Allen v. Camden, etc., Co.,* 46 N. J. L., 198; *Jones v. Texas, etc., R. Co.,* 23 Tex., Civ. App., 65. And in a similar way, by the so-called "Texas rule", when a telegraph company fails by reason of its own negligence to deliver as contracted a message although it was known

that such failure might prove to be the proximate cause of mental distress, damages for the distress so caused are recoverable, in an action on the breach in several jurisdictions. *Chapman v. Western U. T. Co.,* 90 Ky., 265; *Wadsworth v. Western U. T. Co.,* 86 Tenn., 695. Moreover, damages for mental distress are generally recoverable in an action for the breach of the contract of marriage. *Coolidge v. Neat,* 129 Mass., 146; *Vanderpool v. Richardson,* 52 Mich., 336. A few jurisdictions, however, carry this doctrine beyond the exceptions mentioned, while the others refuse to extend the principle not so much because of disapproval of the theories involved as from fear lest the amount and complexity of litigation be unduly increased. *Dunn & Co. v. Smith,* 74 S. W. (Tex. Civ. App.), 576; *Lewis v. Holmes,* 109 La., 1030. See *Yale Law Journal,* vol. xxi, pp. 243, 685, where similar cases are discussed.

HOMICIDE—EVIDENCE—DYING STATEMENTS—ADMISSIBILITY.—JOHNSON v. STATE, 149 S. W., 165 (TEX.).—*Held,* that statements as to the fatal difficulty, made by deceased after he had stated that he believed he he was going to die, and had remarked, "Doctor, you are too late", and when it did not appear that he had any hope of recovery, and while he was sane, and made without persuasion or in answer to interrogatories to lead him to make any particular statement, were admissible as dying declarations.

All authorities uphold the general rule as established by the main case, that statements made by deceased when *in extremis* as to circumstances of his injuries with knowledge of impending death are admissible. *Jones v. State,* 71 Ind., 66; *State v. Craine,* 120 N. C., 601. But if there is any expectation or hope of recovery, however, slight, and though death actually ensued immediately afterwards, the declaration is inadmissible. *Com. v. Roberts,* 108 Mass., 296. The revival of hope after making declaration, does not affect the admissibility. *State v. Reed,* 53 Kans., 767. But declarant's mere statement of no hope of recovery is not conclusive. *Bell v. State,* 72 Miss., 507. However, it is not necessary that he express belief that he will die. *Wills v. State,* 74 Ala., 21; *People v. Gray,* 61 Cal., 164. His knowledge of impending death may be inferred from surrounding circumstances. *People v. Chase,* 79 Hun. (N. Y.), 296. But belief must not be merely in ultimate death. *Starr v. Com.,* 97 Ky., 193. And it is immaterial that statements were made in answer to questions propounded. *People v. Knapp,* 26 Mich., 112. Of course, whatever is receivbale to affect the credibility of a person's testimony may be received to affect that of his dying declarations. *Carver v. U. S.,* 164 U. S., 694. And it is now firmly established that dying declarations are admissible only in cases of homicide, when the death of the deceased is the subject of the charge, and the circumstances of the death, the subject of the statements. *People v. Davis,* 56 N. Y., 95. Nor would these declarations have been excluded if there had been eye witnesses to the deed, or other testimony. *People v. Beverly,* 108 Mich., 509.